DEVI v. FRANCIS

[A.C.J. (Chang Min Tat J.) October 31, 1968]
[Ipoh — Civil Appeal No. 13 of 1967]

Landlord and Tenant — Building on land subject to monthly tenancy — Building purchased under agreement giving clear expectation of right to purchase land — Notice to quit — Whether effective.

Practice and Procedure — Pleadings — Contention of restriction by contract — Reliance on agreement — Preliminary objection.

Landlord and Tenant — Licence — Equitable doctrine of irrevocable licence.

The appellant occupied that part of the respondent's land on which stood a house owned by the appellant. The appellant had commenced occupation of the said house after the purchase of the same from the respondent's mother the terms of which purchase were incorporated in an agreement of sale in writing between them. The respondent subsequently gave one month's notice and claimed possession of the ground on which the house was erected alleging that the tenancy was of the ground on which the house was erected, terminable by one month's notice. The appellant in his defence relied entirely on the agreement and contended that in view of clause 4 of the agreement the tenancy had not been determined and that the "appellant was entitled to occupy the land and house by law and by the said agreement".

At the hearing of the appeal the appellant did not question the validity of the notice to quit and rested her case entirely on the question whether the licence or tenancy granted to the appellant had by being coupled with an interest in the land become irrevocable The respondent raised a preliminary issue that this matter of a licence coupled with an interest was not raised by the pleadings.

Held, allowing the appeal: (1) vague and imprecise though the pleadings may be, there was a contention in the pleadings of a restriction by contract and that the tenancy was not determinable by a month's notice. The appellant's reliance on the agreement was made on the pleadings and therefore this point was clearly open to the appellant on appeal. The preliminary objection should be dismissed;

(2) clause 4 of the agreement provided for a contingency and until that contingency arises by an offer from the landowner or is frustrated by the delivery up of possession by the appellant, the tenancy must subsist. What the appellant had bought was a house with a tenancy of the ground and a clear expectation of a right to purchase the land. Consequently this must imply a condition of the agreement that the landowner or the respondent as her successor in title with notice would not terminate the tenancy by a month's notice until and unless the land had been offered to the appellan to purchase and she had refused;

(3) alternatively on the facts the equitable principle of an irrevocable license would apply and the respondent would be prevented from terminating the tenancy on a month's notice. On a proper construction of clause 4 of the agreement the tenancy was a month to month tenancy and accordingly indefinite in duration, until made definite by the offer of sale by the respondent to the appellant.

Cases referred to:—

(1) *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129.

(2) *Plimmer* v. *The Mayor, Councillors, and Citizens of the City of Wellington* (1884), 9 App. Cas. 699.

(3) *Bachan Singh* v. *Mahinder Kaur & Ors.* [1956] M.L.J. 97.

(4) *Haji Abdul Rahman & Anor.* v. *Mohamed Hassan* [1917] A.C. 209.

(5) *Wong See Leng* v. *C. Saraswathy Ammal* [1954] M.L.J. 141.

(6) *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.* [1913] A.C. 491.

(7) *Lee Eng Teh & Ors.* v. *Teh Thiang Seong & Anor.* [1967] 1 M.L.J. 42.

(8) *Soong Co. Ltd.* v. *Teoh Cheng Sim* [1956] M.L.J. 16.

(9) *Errington* v. *Errington* [1952] 1 K.B. 290.

(10) *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1.

(11) *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173.

(12) *Bowen* v. *Anderson* [1894] 1 Q.B. 164.

(13) *Mellows* v. *Low* [1923] 1 K.B. 522.

MAGISTRATE'S CIVIL APPEAL.

W.S.W. Davidson for the appellant,

N. Sharma for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: This is an appeal against the decision of the President, Sessions Court, Sitiawan acceding to the respondent's claim for possession of that part of the respondent's land on which stands a house owned and occupied by the appellant.

The occupation by the appellant commenced from the purchase by her of a house from the then landowner on terms incorporated in an agreement of sale in writing between them. The vendor was the respondent's mother, who before her death had conveyed the land on which the house stood to him. It was the contention of the respondent that the tenancy was of the ground on which the house was erected terminable by a one month's notice. He therefore, in his statement of claim, insisted that his action for possession was founded on his common law rights as landlord to possession after due termination of the tenancy and, at the trial, denied that the agreement had any effect at law or in equity on his rights to possession. The statement of claim was consequently the bare minimum of averments of tenancy and due termination.

The defence relied entirely on this agreement and since so much hinged on the question of what issues were raised by it I now set out the relevant parts:—

"2. The defendant denies that the tenancy has been duly terminated according to law and states that the exhibit marked 'M.S.F. 1' (i.e. the notice to quit) is not due notice to quit as required by law. The defendant further states that the plaintiff's (*sic*) tenancy is governed by an agreement dated 9th July, 1958 between the plaintiff's mother and the defendant, the original of which agreement will be produced at the trial for its full effect.

4. The defendant is entitled to occupy the house and land in question by law and by an agreement between the parties.

5. The defendant states that it was a condition of the tenancy that the plaintiff and the plaintiff's mother would not terminate the tenancy as it is being done herein."

The agreement referred to in paragraph 4 was obviously the same agreement referred to in paragraph 2. By this agreement the plaintiff's mother sold and the defendant bought the house standing on part of the plaintiff's mother's land for $1,400, subject to the payment of ground rent at $4 a month and a condition in clause 4 providing that:—

"If the owner shall decide to sell the said land, the portion of such land on which the said house is built shall be sold to the purchaser if the purchaser shall so desire."

There was a further provision that the agreement was binding upon the heirs, executors, administrators and assigns of the parties thereto. The execution of the agreement by the owners was witnessed by the plaintiff.

It may be convenient at this stage to refer to certain happenings before the matter came to court. The tenant at some stage or other extended the house and consequently agreed to pay an increased rental of $5 a month. Nothing therefore turned on forfeiture for breach, and it was assumed that if there was forfeiture, the breach was waived. Then on 25th March, 1960 the owner transferred the land to her son, the plaintiff. The plaintiff must consequently be taken to have acquired the land with notice of the agreement. This he could not, of course, deny as he was a witness thereto. But he claimed that there was nothing in the agreement which said that the tenant could never be ejected. Before the action commenced, the plaintiff's mother died and it would appear that the course of events that led to the appearance of the parties in court arose from a demand by the plaintiff for a new agreement and refusal by the defendant. There were other subsequent disagreements between the litigants, but fortunately it is not necessary to refer to them. Then on 2nd September, 1966, the plaintiff by his solicitor served a month's notice to quit expiring on 8th October, 1966, on the contention that the defendant's occupancy commenced on the 9th of the month. The defendant refused to comply with the notice and on 1st November, 1966 the summons for possession was filed in court.

In his grounds of judgment the learned president considered that the defence raised two issues:—

(1) whether the notice given duly terminated the tenancy, and

(2) whether the defendant could still occupy the land by virtue of the agreement.

But despite this, he then found that:—

"The disputes as apparent on the pleadings are:—

(1) whether or not the tenancy has been duly terminated according to law.

(2) whether or not the defendant is a trespasser."

It is apparent therefore that the findings or rulings of the learned president on the issues before him were contrary to his reading of the defence. This is all the more surprising since the learned president heard learned counsel for the defendant submit, as recorded by him that:—

"(1) Agreement D.2.

It can be inferred it is a tenancy which cannot be determined by notice to quit. Plaintiff himself admitted he won't buy a house if he had to quit.

(2) Even if one month's notice was sufficient in this case one month's notice had not been given to defendant."

On appeal, learned counsel for the defendant abandoned the challenge to the notice as one validly giving one month's notice and proposed to base his appeal entirely on the first issue whether or not the licence or tenancy granted to the defendant had by being coupled with an interest in the land become irrevocable. Learned counsel for the respondent however resisted the appeal on a preliminary argument that the grounds submitted in the memorandum of appeal on the first issue constituted a plea that had never been raised in the pleadings, had not been urged in the trial court and no evidence was led on it and the plaintiff was never at any time required to meet such a plea. It was not, it was stressed, a question of a plea being raised and then not being pursued with but it was a plea that was never raised in the trial court and should not now be raised or allowed to be raised in the appellate court. Reference was made to a good number of cases in support of this contention.

On the other hand, learned counsel for the appellant contended with some force that paragraphs 4 and 5 of the statement of defence were sufficiently wide to raise this plea.

The duty now devolves on me to examine the state of the pleadings to ascertain whether the point was made there which it is now sought to exclude. I have, for this reason, set out the relevant pleadings. I do not think it can be said that the defendant's rights under the agreement were not raised. Vague and imprecise the language might be, but in my reading, there was a contention of a restriction by contract and in law that the tenancy was not determinable by a month's notice. The agreement was produced in evidence. Of this agreement the plaintiff was a witness and it must

be concluded that he took the property with notice of the defendant's rights, but it was his view that there was nothing in the agreement which precluded his terminating the tenancy. He did not say and if he did say one must wonder how he could say that he was not bound by the agreement. The defence relied on it and the trial president was also aware of it and expressly stated that the defendant claimed to occupy the land by virtue of the agreement. Moreover he considered the submission, brief and unsupported by reference to any decided cases though it was and in his grounds of judgment dismissed the contention because he thought (without any assistance from the then counsel who made the submission) that the absence of a memorandum of lease to comply with section 116 of the Land Code (F.M.S. Cap. 137) was fatal to any contention that there was a lease for other than month to month.

For myself, I do not think it could be correctly contended that the defendant's reliance on the agreement was never made on the pleadings and at the hearing. If so, this point was clearly available to him on appeal. The numerous cases on which learned counsel for the plaintiff relied are consequently not pertinent.

Accordingly I dismiss the preliminary objection to the appeal.

On the substantive appeal, the question to decide is whether the plaintiff was correct in his submission that the agreement was a monthly tenancy of the ground on which the defendant's house stood and that there was nothing in the agreement to prevent him from terminating the tenancy by a one month's notice. It was never in dispute that the defendant purchased the house from the plaintiff's mother. She died before the hearing and could not be a witness. But the relationship they entered into was expressed in the agreement and the intention of the parties thereto must be discerned within its four corners and nowhere else. The language in clause 4 would appear to give the defendant a clear expectation of a prior offer to purchase the relevant portion of the land before the owner would dispose of it. If she had this expectation and as a matter of construction would be to nullify and treat as surplusage clause 4 in clear contravention of the maxim *ut res valeat quam peheat* and other rules of construction. Carried to its logical conclusion, the argument of the plaintiff would mean that even under the agreement, the landowner could have determined the lease which commenced on 9th July, 1958 by giving a notice within the first month to terminate the tenancy on the expiry of the second month, so that the purchaser of the house would have at the most a term certain of 2 months. If any difficulty arose from any contention that the house was so fixed to the land as to be inseparable from it, that difficulty could be resolved in the mind of the landlord by a magnanimous gesture on his part to allow the evicted tenant to retain her rights to the house by being given the opportunity of demolishing it and taking away the component parts. What the defendant had secured, according to the plaintiff, by an expenditure of a fairly large sum of money, was therefore a monthly tenancy and the ownership of a house so long as the tenancy subsisted and after its due termination, the ownership not of a habitation but of a dismantled assortment of timber and chipped pieces of concrete.

The defendant relied on the equitable doctrine of an irrevocable licence which was coupled with a grant, as in the following statement of Lord Kingsdown in *Ramsden* v. *Dyson* [1] at page 170 which though often cited bears repeating:—

> "The rule of law applicable to the case appears to be this: If a man, under a verbal agreement with a landlord for a certain interest in land or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell* 18 Ves. 328, and, as I conceive, is open to no doubt. . . .
>
> If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or as allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of law or equity can enforce. This was the principal of the decision in *Pillay* v. *Armitage* 12 Ves. 78, and like the decision in *Gregory* v. *Mighell*, seems founded on plain rules of reason and justice."

This statement of the law was approved and applied by the Privy Council in *Plimmer* v. *The Mayor, Councillors, and Citizens of the City of Wellington.* [2] In that case, Plimmer with the permission of the Crown constructed in 1848 a wharf on Crown lands in Wellington Harbour, New Zealand. In 1855 the depth of water having fallen, he made a jetty which stretched a considerable distance into the harbour. Later that year, the land was conveyed by the Crown to the Provincial Government. In 1856 at the instance of the Provincial Government, Plimmer extended this jetty a further 112 feet. The Privy Council held that in the first instance Plimmer occupied the land under a revocable licence to use it for the purpose of a wharfinger but that the events of 1856 had rendered the licence irrevocable. In the judgment of the Privy Council:—

"Is it to be held that, when he had incurred the expense of dealing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived his summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible."

The application of this statement of the law is of course the intervention of equity. But for the plaintiff it is said to be a mistake to import into our land law any concept of English law or principles of equity. And in support of this contention, reference was made to *Bachan Singh* v. *Mahinder Kaur & Ors.*[3] and to section 6 of the Civil Law Ordinance, 1956.

Bachan Singh's case dealt with a purchase of land. The only question that appeared to arise was whether in the circumstances of one of the purchasers dying after the execution of the transfer by the vendor which made the original transfer incapable of registration the sub-purchaser was entitled to an order under section 240 of the F.M.S. Land Code directed to the Registrar of Titles to register what he had bought. Holding that the antecedent contract was a binding contract, Thomson J. (as he then was) gave the order asked for. In coming to his decision the learned judge said he would avoid the technicalities of the English law relating to trusts and equitable interests and held that the purchaser's right was a legal right of the nature of a chose in action. There is with respect nothing I can find in the judgment to support the contention now made.

The passage that would appear to occasion a little difficulty is that from the decision of Lord Dunedin in the Privy Council in *Haji Abdul Rahman & Anor.* v. *Mohamed Hassan* [4] which case was referred to in the above decision.

"It seems to their Lordships that the learned judges, in these observations, have been too much swayed by the doctrine of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment."

Now the observations made by the learned judges in the courts below were on the equity of redemption of a mortgage and the equitable principle of "once a mortgage, always a mortgage." Their Lordships in the Privy Council however preferred to regard a transfer of land with a condition for re-transfer to the vendor on payment of the purchase price not as a mortgage since in their view under the land system in force the relationship of mortgagor and mortgagee could only be constituted by and under a properly registered charge but as a matter of contract. This decision that under such circumstances, the transferor's right to the return of the land was a right to sue under the agreement was followed in the Court of Appeal in *Wong See Leng* v. *C. Saraswathy Ammal.*[5] But it seems to me that neither of these two cases is any authority for the complete exclusion of equity. On the other hand, the right of the contractual purchaser of a part of the land the whole of which was afterwards bought by and registered in the name of another party with knowledge however of the first party's right was upheld in the Privy Council in *Loke Yew* v. *Port Swettenham Rubber Co. Ltd.*[6] In the words of Lord Moulton at pp. 504-505:—

"So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who had suffered the wrong. Indeed the duty of the court to rectify the register in proper cases is all the more imperative because of the absoluteness of the effect of the registration if the register be not rectified. . . . It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do."

The other objection is based on section 6 of the Civil Law Ordinance, 1956 which excludes the application of the law of England relating to tenure or conveyance or assurance of or succession to any immovable property or any estate right or interest therein. The answer to this objection is that the land law of England is one thing and equity another matter and it is expressly provided in section 3(1) of the same Ordinance that the court shall apply the common law of England and the rules of equity and in section 3(2) that in the event of conflict the rules of equity shall prevail.

There are at least two local cases on the application of this equitable principle of an irrevocable licence. In *Lee Eng Teh & Ors.* v. *Teh Thiang Seong & Anor.*,[7] Gill J. who cited the first limb of Lord Kingsdown's statement of the law found that the facts raised this equity. On the other hand in *Soong Co. Ltd.* v. *Teoh Cheng Sim*,[8] it was held that the facts fell within the second limb and no equity was available to the tenant.

It is true that in neither case was the point taken whether equity applied. *Soong's* case referred to a piece of land in Butterworth where the English system of registration of deeds prevailed and is not exactly in point. In *Lee Eng Teh's* case, the land was situated in Selangor. The *Torrens system* there applied. Gill J. assumed equitable jurisdiction. With respect, I am of the view that in a proper case where the facts so justify it, the equitable principle of an irrevocable licence which is coupled with a grant applies.

I think it will be convenient at this stage to consider whether the equity will also restrict a successor in title of the landowner who had

encouraged this expectation of an interest. The answer lies in the case of *Errington* v. *Errington.*[9] In that case, a father had bought a house through a building society by paying a lump sum by way of initial payment and leaving the balance on mortgage to be repaid by monthly sums. He kept the conveyance in his name but told his son and daughter-in-law that they could remain in occupation and that if they paid the instalments, he would then transfer the property to them. He died before the last instalment was paid and in his will left all his property including the house in question to his widow. The daughter-in-law continued in possession. The widow's claim for possession was dismissed. On appeal, the Court of Appeal held that the daughter-in-law and her husband were licensees but entitled under a personal contract to occupy the house for as long as they paid the instalments to the building society and, *semble,* with an equitable right to call for the fee simple as soon as they had paid the last instalment. Further, provided that they continued to observe the terms of the bargain, they held an equitable interest that was enforceable not only against the licensor but also against his devisees.

These authorities are however said by learned counsel for the plaintiff to be inapplicable since they all dealt with licences and the issue in this case was in respect of a tenancy. With all respects, I do not agree. A tenancy is only that species of licence to which are attached the covenants for quiet enjoyment and for exclusive possession and if on these authorities, a licence could become irrevocable, then, a fortiori, there is a stronger case for making a tenancy irrevocable under similar circumstances.

Now the facts which were not seriously in dispute have been referred to. Had the defendant purchased a house with a tenancy of the land on which it stood, for a maximum term certain of two months and thereafter on a monthly basis until determined by a month's notice? Or had she bought it with the restriction by agreement, as she put it in her defence, on the right of the landowner to determine the tenancy, as it was done, by a month's notice? The defendant sought to rely on clause 4 of the agreement as establishing such restriction. The plaintiff said it had no such effect.

If clause 4 is given effect to, and there is no reason which I can see why it should not be, then it becomes in my view a simple matter of construction. Clause 4 is not limited in time to the two months certain of a monthly tenancy. It provides for a contingency and until that contingency arises by an offer from the landowner or is frustrated by the delivering up of possession by the defendant, the tenancy must subsist. What the defendant had bought was a house with a tenancy of the ground and a clear expectation of a right to purchase the land. Contractually, this must imply a condition of the agreement that the landowner or the plaintiff as her successor in title with notice would not terminate the tenancy by a month's notice until and unless the land had been offered to the defendant to purchase and she had refused. This condition is in substance what was raised in paragraph 5 of the defence and if there was this condition, then the plaintiff could not terminate the tenancy in breach of his contractual obligation.

If however I am wrong that the issue between the parties was essentially a matter of contract, then I would on the facts of this case apply the equitable principle of an irrevocable licence and hold the same thing that equity will prevent the plaintiff from terminating the tenancy on a month's notice. I would however make it clear that in my view the extension to the house on which learned counsel for the defendant attempted to raise a further equity falls within the second limb of Lord Kingsdown's statement and is on all fours with *Soong's* case, since there was no evidence of creating or encouraging an expectation. But this of course is hardly material.

Whether the defendant's right to resist the claim is founded on the law of contract or on equity, the learned president's fear of the operation of section 116 of the F.M.S. Land Code is, with respect, not well founded.

The next question is the duration of the irrevocability. In *Hurst* v. *Picture Theatres Limited,*[10] where a ticket holder who was ejected from a theatre recovered damages for assault, and in the circumstances it was not possible for him to avoid eviction by obtaining an injunction, he was considered however entitled to an injunction by Buckley L.J. who said at p. 10:—

> "If the facts here are, as I think they are, that the licence was a licence to enter the building and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke the licence until the play had run to its termination."

In the House of Lords, in *Winter Garden Theatre (London) Limited* v. *Millennium Productions Limited,*[11] Viscount Simon at p. 189 referring to *Hurst's* case said:—

> "I regard this case as rightly decided, and repudiate the view that a licensor who is paid for granting his licensee to enter premises in order to view a particular event, can nevertheless, although the licensee is behaving properly, terminate the licence before the event is over, turn the licensee out, and leave him to an action for the return of the price of his ticket. The

licence in such a case is granted under contractual conditions, one of which is that a well-behaved licensee shall not be treated as a trespasser until the event which he has paid to see is over, and until he has reasonable time thereafter to depart."

Therefore the duration of the licence is to be determined by the intention of the parties, which in turn may be inferred from the circumstances. The inference may be that the licence is to continue permanently as in *Plimmer's* case and in *Lee Eng Teh's* case or until a reasonable time to withdraw from the land has been allowed to the licensee as in the *Winter Garden's* case. On the facts of this case, and on a proper construction being given, as of course it should be given, to clause 4 of the agreement, I am of opinion that the tenancy is a monthly tenancy which as ordinary and unrestricted monthly tenancies are, indefinite in duration (see *Bowen* v. *Anderson* [12] and *Mellows* v. *Low* [13]) until, in this case, made definite by the happening of the contingency therein contractually provided for i.e. until the plaintiff had offered to sell the land to the defendant, and thereafter in the event of a refusal to buy by the defendant, by a month's notice. Consequently I am of the view that in the absence of any offer to sell the land to the defendant, plaintiff's notice to quit on which he relied did not have the effect either at law or in equity of terminating the defendant's tenancy.

The appeal is allowed with costs here and in the court below.

Appeal allowed.

Solicitors: *Gibbs & Co.; N. Sharma.*

NAFSIAH v. ABDUL MAJID

[O.C.J. (Sharma J.) May 5, 1969]
[Malacca — Civil Suit No. 48 of 1965]

Practice and Procedure — Jurisdiction — High Court — Muslims — Marriage — Breach of promise — Administration of Muslim Law Enactment, 1959 — Courts Ordinance, 1948 — Courts of Judicature Act, 1964.

In this action for damages for breach of promise to marry, the defendant raised as a preliminary point, the jurisdiction of the High Court to entertain the claim. The parties were Muslims. Section 40(3)(b) of the Administration of Muslim Law Enactment, 1959 gives the court of Kathi Besar jurisdiction to determine all proceedings in which the parties profess the Muslim religion and which relate to marriage. It was argued that the provision excluded the jurisdiction of the High Court to try the claim.

Held, in dismissing the preliminary objection: the Courts of Judicature Act, 1964 which by virtue of section 4 therein, prevail over any other written law other than the Constitution, expressly bestows upon the High Court jurisdiction to estertain claims for damages arising out of breach of promise to marry, and such jurisdiction is not excluded merely by reason that the parties to the action are Muslims.

CIVIL SUIT.

Ee Yew Lin for the plaintiff.

G.R.T. Chelvam for the defendant.

Sharma J. (delivering oral ruling): In this case the defendant has, in his statement of defence in paragraph 4 thereof, raised the question of jurisdiction of this court to entertain the claim of the plaintiff.

At the start of these proceedings I consequently asked counsel for the defendant to argue this point as a preliminary point so that if he did succeed the suit could be disposed of under the provisions of O. 25 r. 3 of the Rules of the Supreme Court, 1957. Reliance was placed by Mr. Chelvam on the provisions of section 40(3)(b) of the Administration of Muslim Law Enactment, 1959 of the State of Malacca, the relevant provisions of which read as follows:—

"The court of the Kathi Besar shall in its civil jurisdiction hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to marriage."

It was urged upon me that both the plaintiff and the defendant were prosecuted under section 149(3) of the Administration of Muslim Law Enactment, 1959 before the Kathi Besar in Malacca and convicted and the plaintiff's claim now before the court should have been brought in those proceedings before the Kathi Besar's court. A suggestion was also made that the matter is *res judicata*. I do not see any strength in that argument. The prosecution in the Kathi Besar's court was under section 149(3) of the Administration of Muslim Law Enactment, 1959 and no question of any issues relating to civil rights of the parties could arise in those proceedings.

I find no provision in the Administration of Muslim Law Enactment, 1959 that the Kathi Besar has the exclusive jurisdiction in all matters relating to or arising out of the marriage of Muslims. The Courts of Judicature Act, 1964 expressly gives jurisdiction to this court under section 24(a) and 25(1)(a) to try matters arising in the present suit which is nothing more than a suit for damages arising out of a breach of promise to marry.

Further section 109 of the Courts Ordinance, 1948 which has not been repealed by the Courts of Judicature Act, 1964 clearly stipulates that in the case of any conflict or any inconsistency between the provisions of the Courts Ordinance, 1948 and the provisions of any other written law in force at the commencement of the Courts Ordinance, 1948 the provisions of the Courts Ordinance, 1948 should prevail. While it is true that the Administration of Muslim Law Enactment No. 1 of